

unenforceable against the location provider.⁶³² AT&T states that it has received information that BellSouth, in particular, has entered into such agreements with location providers.⁶³³

3. Comments

229. InterLATA Presubscription. CompTel filed comments disagreeing with the Commission's finding that BOC participation in the selection of interLATA carriers presubscribed to their payphones is not contrary to the public interest.⁶³⁴ CompTel argues that the BOCs have market power in payphone presubscription as a result of their control over large volumes of interLATA traffic. It asserts that the BOCs' ability to aggregate large volumes will give the BOCs significant bargaining power they can exercise when negotiating with IXCs for presubscription, which could enable the BOCs to demand from IXCs concessions such as the IXC pay the BOC excessive billing and collection rates.⁶³⁵ CompTel also argues that the BOCs' control over large volumes of traffic will enable them to obtain the profit margins that a reseller typically enjoys, allowing the BOCs to become de facto resellers of interLATA services.⁶³⁶ CompTel explains that a BOC would be able to negotiate the lowest rates with IXCs and keep for itself whatever difference exists between its costs for interLATA service and the rates charged to end users, and argues that this de facto provision of interLATA service is inconsistent with the requirements of Section 271 of the 1996 Act.⁶³⁷

230. AT&T asserts that the Commission should deny BellSouth's request for clarification regarding "branding" because PSPs should not be allowed to "audibly brand" its payphones in a manner that might confuse consumers about the identity of the suppliers that are providing them with the different services offered at payphones.⁶³⁸ AT&T argues that this is particularly problematic where a BOC seeks to brand interLATA calls prior to receiving approval

⁶³² AT&T Petition at 22-23.

⁶³³ Id.

⁶³⁴ CompTel Comments at 15. CompTel was the only party to request reconsideration of our decision to grant the BOCs presubscription rights pursuant to Section 276(b)(1)(D). For the reasons discussed previously, see note 200, above, we are not required to formally reconsider this issue. As CompTel itself recognizes, however, each of the arguments made in its filing were also made in its initial comments and those of other parties. Accordingly, we would, in any event, decline to reconsider our conclusions in this regard for the reasons laid out in the Report and Order. See Report and Order at paras. 225-238.

⁶³⁵ Id. at 15-16.

⁶³⁶ Id. at 16.

⁶³⁷ Id.

⁶³⁸ AT&T Comments at 11-12.

to offer in-region interLATA relief pursuant to Section 271. AT&T also asserts that BOC operators that provide operator services on behalf of other carriers should not be permitted to identify themselves as representatives of the BOC.⁶³⁹ NJPA also argues that to the extent that a BOC is represented, via branding, as a provider of interLATA service, the BOC is in violation of Section 271.⁶⁴⁰ MCI and Sprint also oppose BellSouth's request for authority to engage in "branding" of OSP service.⁶⁴¹ MCI argues that the purpose of the OSP audible identification is to provide notice to the consumer concerning the identity of the OSP so that the consumer has the choice whether or not to use that OSP's services. MCI concludes that since the BOC cannot be the OSP for interstate services before it has obtained such approval, it would be confusing and misleading to the consumer to allow BOCs to brand or co-brand interstate OSP calls.⁶⁴²

231. Grandfathering of Contracts. BellSouth opposes AT&T's request that the Commission clarify that contracts entered into between BOCs and location providers concerning interLATA presubscription, but before approval of the BOC's CEI plan, are void and unenforceable against the owner.⁶⁴³ BellSouth argues that nothing in Section 276 concerns contracts entered into after February 8, 1996, and the Commission should not say anything about such contracts. BellSouth further argues that the Commission correctly determined that any effort to identify unenforceable contracts would be overbroad, would interfere with the jurisdiction of state courts, and would result in location providers being denied their choice of interLATA carriers.⁶⁴⁴ In response to AT&T's assertion that BellSouth has already been negotiating with location providers concerning the provision of interLATA services, BellSouth states that it "in its contacts with location providers, BellSouth has not promised to provide or arrange for such service by any particular date, but has always made clear that any agreements relating in any way to interLATA service can only be effective upon, and are subject to, the approval and implementation by the Commission of regulations pursuant to Section 276 that authorize BellSouth to provide such service."⁶⁴⁵

⁶³⁹ Id.

⁶⁴⁰ NJPA Comments at 18.

⁶⁴¹ MCI Comments at 6-7; Sprint Comments at 16.

⁶⁴² Id.

⁶⁴³ BellSouth Comments at 4.

⁶⁴⁴ Id. at 5.

⁶⁴⁵ BellSouth Comments at 5-7.

4. Discussion

232. InterLATA Presubscription. In *ex parte* filings submitted after the close of the initial comment period in this rulemaking, BellSouth first requested that the Commission find that Section 276(b)(1)(D) of the 1996 Act authorized BOC PSPs to engage in reselling and branding of interLATA service for their payphones.⁶⁴⁶ In the Report and Order, we denied this request, finding that the reselling and branding of interLATA service was not within the specific rights granted to the BOCs by Section 276(b)(1)(D), which provides only that BOCs may have the same rights as independent PSPs "to negotiate with the location provider on the location provider's selecting and contracting with, and . . . to select and contract with, the carriers that carry interLATA calls from their payphones . . ."⁶⁴⁷ BellSouth now requests reconsideration on whether BOCs may engage in branding (apart from reselling) of interLATA service for its payphones.⁶⁴⁸

233. We find that nothing in Section 276(b)(1)(D) of the 1996 Act authorizes BOCs to engage in branding, or as BellSouth sometimes refers to it, "packaging," of interLATA service. BellSouth's underlying argument is fallacious for the same reasons stated in the Report and Order. Section 276(b)(1)(D) does not place BOCs on an equal footing with independent PSP in every conceivable regard. That section is, by its own terms, limited to BOCs "negotiating" with location providers with respect to the location providers' "selecting and contracting" for interLATA service to their payphones.⁶⁴⁹ We previously rejected BellSouth's argument that this necessarily allowed a BOC to engage in all conduct allowed of non-BOC PSPs, including the provision of interLATA service to payphones outside of the requirements of Section 271 of the 1996 Act.⁶⁵⁰ It similarly does not follow that the language of Section 276 authorizes a BOC to "brand" interLATA OSP service -- in effect, holding itself out as providing such service -- simply

⁶⁴⁶ Ex Parte Letter from Ben G. Almond, BellSouth, to William F. Caton, Acting Secretary, FCC, August 16, 1996.

⁶⁴⁷ Report and Order at para. 244. See 47 U.S.C. § 276(b)(1)(D).

⁶⁴⁸ BellSouth Comments at 22-23. While expressing disagreement with the Commission's conclusion concerning reselling, BellSouth's Petition appears to request reconsideration or clarification only of the status of branding. *Id.* at 4 ("BellSouth requests the Commission reconsider its use of the conjunctive/disjunctive "and/or" and clarify the scope of branding opportunities available to BOCs in light of the 1996 Act"). To the extent that BellSouth intended to request reconsideration of the reselling issue as well, we would decline to do so. BellSouth raises no new arguments to support its position on this issue, and we accordingly deny such request for the reasons stated in the Report and Order. See Report and Order at para. 244.

⁶⁴⁹ 47 U.S.C. § 276(b)(1)(D).

⁶⁵⁰ Indeed, BellSouth's argument, followed to its logical end, would completely eviscerate the requirements of Sections 271 and 272.

because non-BOC PSPs may be able to do so.⁶⁵¹ We are confident that if Congress had intended such a broad grant of authority, it would not have included such specific limiting language in the statute. We also believe that to the extent a BOC is holding itself out to the public as providing interLATA service through use of an audible brand identifying itself as the carrier, such conduct would seem to be inconsistent with the goals of TOCSIA,⁶⁵² as well as inconsistent with the requirements of Section 271 of the 1996 Act.⁶⁵³ For the above reasons, and those detailed in the Report and Order, we conclude that Section 276 of the 1996 Act does not grant BOCs the right to "brand" or "package" interLATA service.

234. In conjunction with our previous discussion of BOC CEI plans, we have already addressed SW Bell's request that the Commission clarify its rules to ensure expedited approval of those plans.⁶⁵⁴

235. Contracts. AT&T first requests that we clarify that nothing in the statute or the new rules allows location providers to terminate contracts with carriers regarding the interLATA carrier presubscribed to payphones on their premises, regardless of the date of such agreements.⁶⁵⁵ We believe the Report and Order is quite clear on this issue, and so decline AT&T's request.⁶⁵⁶

⁶⁵¹ Of course, non-BOC PSPs may brand because they are allowed to be the OSP for interLATA service. Indeed, to this extent, TOCSIA requires that they do so. See 47 U.S.C. § 226(b).

⁶⁵² 47 U.S.C. § 226. See Report and Order, Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744, 2747 (1991) ("The objectives of the Act are to ensure that consumers are protected from unfair and deceptive practices relating to their use of operator services to place interstate long distance calls and, second, to ensure that consumers have the opportunity to make an informed choice in making such calls"). Under our rules implementing TOCSIA, the OSP identified in the brand is to be the entity that is setting the rates and whose name will ultimately appear on the consumer's bill. See Id. at 2757, para 29. BellSouth's proposal would at least create the possibility of significant consumer confusion: if the BOC is not yet allowed to offer interLATA service, and therefore can not bill under its own name for the service being provided, it would be confusing for the caller to hear the BOC's name during the brand.

⁶⁵³ See 47 U.S.C. § 271. BellSouth cites to the Commission's Order approving the petition of Bell Atlantic, et al., for waiver of Section 69 of the Commission's rules, to support its assertion that "BOC PSPs have long been allowed to provide operator services to interexchange carriers." See Bell Atlantic Telephone Companies, 9 FCC Rcd 7868 (1994). This is not the same as the provision of "operator service" as defined by the rules implementing TOCSIA. 47 U.S.C. § 226. We also note that the Commission in that order declined to consider whether the proposed waiver would violate the MFJ prohibition against BOC provision of interLATA services, in that any such claim was, at that time, appropriately raised with the District Court, not the Commission. Id. at 7870, ¶ 17.

⁶⁵⁴ See para. 220, above.

⁶⁵⁵ AT&T Petition at 22.

⁶⁵⁶ Report and Order at paras. 250-252.

236. AT&T's other request, however, raises serious questions. AT&T asserts that at least one BOC has already negotiated and entered into agreements with location providers for the presubscription of interLATA service to payphones on the location providers' premises.⁶⁵⁷ In reply, BellSouth does not deny that it has entered into such contracts, but asserts that all such contracts it has entered into include provisions specifying that they are contingent upon BellSouth obtaining Commission approval to provide such services.⁶⁵⁸ We find BellSouth's explanation unpersuasive. Section 276(b)(1)(D) grants BOCs the authority to negotiate and contract with location providers with respect to the interLATA carrier presubscribed to their payphones.⁶⁵⁹ Congress conditioned this grant of authority upon the completion of this Commission rulemaking, specifically required by Section 276, for purposes of evaluating whether granting such rights would be consistent with the public interest.⁶⁶⁰ In carrying out this responsibility, we have determined that each BOC should first be required to establish certain nonstructural and accounting safeguards as a prerequisite to being allowed to exercise these presubscription rights.⁶⁶¹ We concluded that such precautions were necessary to prevent the BOCs from acting in an anticompetitive manner in the provision of these services and, ultimately, to protect the interests of the public.

237. We now conclude that contracts entered into pursuant to the grant of authority in Section 276(b)(1)(D) and prior to a BOC receiving approval of a CEI plan required by the Report and Order are in violation of the Commission's rules adopted in this proceeding. Our decision to require the filing and approval of CEI plans was, in part, to prevent the BOCs from using their control over bottleneck facilities and other resources in order to obtain a competitive advantage over the non-LEC PSPs.⁶⁶² The Commission has no way of ascertaining whether agreements entered into prior to the completion of these requirements were negotiated in a manner consistent with these policies. While we are not in a position to declare null and void specific contracts that we have not determined to be unlawful, we will review any complaints concerning such contracts in light of this policy.

⁶⁵⁷ AT&T Petition at 22-23.

⁶⁵⁸ BellSouth Comments at 5-7.

⁶⁵⁹ 47 U.S.C. § 276(b)(1)(D).

⁶⁶⁰ Id.

⁶⁶¹ Report and Order at para.239.

⁶⁶² Id. at paras. 236-238.

E. **ABILITY OF PAYPHONE SERVICE PROVIDERS TO NEGOTIATE WITH LOCATION PROVIDERS ON THE PRESUBSCRIBED INTRALATA CARRIER**

1. **Report and Order**

238. The Report and Order implements Section 276(b)(1)(E) of the 1996 Act which directs the Commission to provide all payphone service providers with the right to participate in the selection of the intraLATA carriers presubscribed to their payphones.⁶⁶³ In furtherance of this statutory directive, we also concluded that state regulations which require the routing of intraLATA calls to the incumbent LEC are preempted.⁶⁶⁴ We also ordered that intraLATA carriers presubscribed to payphones should be required to meet the Commission's minimum standards for routing and handling emergency calls.⁶⁶⁵

2. **Petitions**

239. APCC requests that the Commission clarify that, for purposes of Section 276(b)(1)(E), "intraLATA" calls include local calls.⁶⁶⁶ APCC argues that there is no evidence that Congress meant to exclude local calls from the scope of Section 276(b)(1)(E), and the policies of market competition and freedom of choice that support PSPs' right to select the intraLATA carrier presubscribed to their payphones are equally applicable to intraLATA local calls as to intraLATA toll calls.⁶⁶⁷

240. APCC also requests reconsideration of the determination that the 1996 Act's provision of intraLATA presubscription rights to PSPs does not preempt all state rules that require the routing of 0- traffic to the incumbent LEC, provided that "the state does not mandate that the LEC ultimately carry non-emergency intraLATA calls initiated by dialing '0' only."⁶⁶⁸ APCC argues that routing of 0- calls to the LEC inevitably results in the LEC gaining an unwarranted advantage in terms of the ability to turn 0- calls into revenue producing calls. It asserts that any procedure selected for nondiscriminatory handling of non-emergency calls by the LEC will still result in caller confusion and decreased service on calls directed to non-LEC

⁶⁶³ Id. at para. 259. See 47 U.S.C. § 276(b)(1)(E).

⁶⁶⁴ Report and Order at para. 261. See 47 U.S.C. § 276(c).

⁶⁶⁵ Id. at para. 260.

⁶⁶⁶ APCC Petition at 3, n. 2.

⁶⁶⁷ Id.

⁶⁶⁸ APCC Petition at 4.

carriers.⁶⁶⁹ APCC states that 16 states currently have such requirements, while the remaining states allow 0- calls to be routed to other OSPs that meet applicable standards for handling emergency calls.⁶⁷⁰ APCC concludes that the Commission should reconsider and rule that 0- calls can be routed to any OSP, subject to the requirements of Section 64.706 of the Commission's rules and to the ability of the states to establish nondiscriminatory standards for OSPs to qualify to handle emergency calls.⁶⁷¹

3. Comments

241. AT&T and Peoples support APCC's request for reconsideration of the determination in the Report and Order that states may be allowed to require 0- calls to be routed to the incumbent LEC, so long as non-emergency calls are then forwarded to the OSP selected by the payphone provider.⁶⁷² AT&T asserts that a state's interest in assuring proper handling of emergency calls from payphones can be addressed by requiring that 0- calls be sent only to OSPs that meet appropriate standards.⁶⁷³ AT&T argues that not permitting non-LEC OSPs to handle emergency 0- calls places such OSPs at a competitive disadvantage, by allowing such calls to be screened by LEC operators.⁶⁷⁴ Peoples argues that public safety will actually be enhanced by allowing PSPs to choose their intraLATA OSP because such OSPs will have vital information not available to the ILEC, such as the location of the PSP payphone. Therefore, the OSP will be better able to direct emergency services to the proper location.⁶⁷⁵ Peoples also states that it does not believe that the technology exists to effectuate switching from the LEC OSP to the PSP OSP if the call is initially required to be routed to the LEC. Peoples also asserts that LECs competing for OSP services are likely to be uncooperative in directing such calls back to the presubscribed OSP.⁶⁷⁶

⁶⁶⁹ Id. at 4-6.

⁶⁷⁰ Id. at 4.

⁶⁷¹ Id. at 6.

⁶⁷² AT&T Comments at 13; Peoples Comments at 7-8.

⁶⁷³ Id.

⁶⁷⁴ Id.

⁶⁷⁵ Peoples Comments at 7.

⁶⁷⁶ Id.

4. Discussion

242. As to APCC's first issue, we confirm that it is our intent and understanding that, for purposes of the rules implementing Section 276(b)(1)(E) of the 1996 Act, intraLATA calls include local calls.⁶⁷⁷ We agree with APCC's reasoning that the policies supporting free competition in intraLATA presubscription are equally applicable to local calls.

243. We decline, however, to reconsider our decision to allow states to require 0- calls to be initially routed to the incumbent LEC or other local service provider, provided that the state does not mandate that the LEC or local service provider ultimately carry non-emergency intraLATA calls initiated by dialing '0' only.⁶⁷⁸ As we stated in the Report and Order, and based upon the record before us, we do not find that such requirements are necessarily inconsistent with the statutory language that PSPs should be allowed to negotiate for the intraLATA carriers presubscribed to their payphones.⁶⁷⁹ States may impose reasonable requirements on the exercise of these rights, especially for purposes of ensuring public health and safety. The policy arguments set forth by the parties are, accordingly, more appropriately directed to the individual states. For this reason, we are unwilling at this time to find that a state requirement concerning the initial routing of 0- calls, in order to ensure that 0- emergency calls are handled in an appropriate and timely manner, unduly burdens non-LEC PSPs.

F. ESTABLISHMENT OF PUBLIC INTEREST PAYPHONES

1. Report and Order

244. Section 276(b)(2) of the 1996 Act directs the Commission to "determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably."⁶⁸⁰ In the Report and Order, we concluded that there is a need to ensure the maintenance of public interest payphones that serve public policy interests in health, safety, and welfare, in locations where there might not otherwise be a payphone as a result of the operation of the market.⁶⁸¹ We explained that all payphones serve the public interest by providing access to basic communications services,

⁶⁷⁷ 47 U.S.C. § 276(b)(1)(E).

⁶⁷⁸ Report and Order at para. 262.

⁶⁷⁹ Id. See 47 U.S.C. § 276 (c) which authorizes the Commission to preempt state requirements that are "inconsistent" with the Commission's regulations.

⁶⁸⁰ 47 U.S.C. § 276(b)(2).

⁶⁸¹ Report and Order at para. 277.

and expressed particular concern about the role served by payphones in providing access to emergency services, especially in isolated locations and areas with low levels of residential phone penetration.⁶⁸² We recognized that a freely competitive marketplace may not provide for payphones in locations where they serve important public policy objectives, but which, for various reasons, may not be economically self-supporting.⁶⁸³

245. We further concluded that primary responsibility for administering and funding public interest payphone programs should be left to the states, subject to guidelines adopted by the Commission.⁶⁸⁴ We found that the states are better equipped than the Commission to respond to geographic and socio-economic factors affecting the need for such payphones that are too diverse to be effectively addressed on a national basis.⁶⁸⁵

246. In fulfilling our statutory obligation under Section 276, however, we adopted as a definition of "public interest payphone," a payphone which (1) fulfills a public policy objective in health, safety, or public welfare, (2) is not provided for a location provider with an existing contract for the provision of a payphone, and (3) would not otherwise exist as a result of the operation of the competitive marketplace.⁶⁸⁶ We also concluded that the statutory language mandating that the Commission ensure that PIPs be "supported fairly and equitably" requires a national guideline that companies providing PIPs be fairly compensated for the cost of such services.⁶⁸⁷

247. With respect to the funding of state PIP programs, we stated that states should have discretion with respect to funding their respective public interest payphone programs, so long as the funding mechanism, (1) fairly and equitably distributes the cost of such a program, and (2) does not involve the use of subsidies prohibited by Section 276(b)(1)(B) of the 1996 Act.⁶⁸⁸ State programs supporting public interest payphones are also subject to the provision of Section 253(b) of the 1996 Act which requires that such a program be implemented on a "competitively neutral basis."⁶⁸⁹ We specifically recognized that states may address the need for

⁶⁸² Id.

⁶⁸³ Id. See 47 U.S.C. § 276(b)(1)(B).

⁶⁸⁴ Report and Order at para. 278-280.

⁶⁸⁵ Id.

⁶⁸⁶ Id. at para. 282.

⁶⁸⁷ Id. at para. 283.

⁶⁸⁸ Id.

⁶⁸⁹ Id. at para. 283, n. 915.

public interest payphones by adopting appropriate rules in conjunction with their state universal service plans pursuant to Section 254(f) of the 1996 Act.⁶⁹⁰ We found that the implementation of a public interest payphone program is consistent with the goals of universal service.⁶⁹¹

248. Also in furtherance of our statutory responsibility under Section 276(b)(2), we directed each state to review whether it has adequately provided for public interest payphones in a manner consistent with the Report and Order.⁶⁹² Each state is required, within two years of the date of issuance of the Report and Order, to evaluate whether it needs to take any measures to ensure that payphones serving important public interests will continue to exist in light of the elimination of subsidies and other competitive provisions established pursuant to Section 276 of the 1996 Act, and that any existing programs are administered and funded consistent with the Commission's rules.⁶⁹³

2. Petitions

249. APCC urges a modification of the definition of PIPs that would prohibit a state from designating a payphone as a PIP if it is located within 200 yards of another payphone, unless there is some physical barrier to access.⁶⁹⁴ APCC asserts that the proximity of another payphone is ample proof that the location in question is not one where payphones cannot be profitably maintained, and therefore placing a PIP in such a location would be inconsistent with the 1996 Act and the policies adopted in the Report and Order.⁶⁹⁵

250. Ohio PUC requests reconsideration of the Commission's determination that PIPs may not be placed in locations where payphones already exist as a result of the market, but where the market is not operating properly in other respects.⁶⁹⁶ It expresses the concern that the rules would prohibit placement of PIPs in a location where a PSP was realizing extraordinarily high profits from end users who had no other viable alternatives for payphone services. Ohio PUC argues that the payphone marketplace is inherently dysfunctional in that agreements for the provision of services are between the PSP and the location providers,

⁶⁹⁰ Id. at para. 284.

⁶⁹¹ Id.

⁶⁹² Id. at para. 285.

⁶⁹³ Id.

⁶⁹⁴ APCC Petition at 6.

⁶⁹⁵ Id. at 6-7.

⁶⁹⁶ Ohio PUC Petition at 5.

excluding the participation of the end users.⁶⁹⁷ Particularly where locational monopolies exist, competition will be concerned with maximizing commissions to location providers, rather than operating to keep rates to end users at reasonable levels.⁶⁹⁸ Ohio PUC also argues that the Act does not preempt state commissions' authority to determine appropriate locations for PIPs.⁶⁹⁹

3. Comments

251. Puerto Rico Telephone opposes APCC's request that the Commission modify the definition of public interest payphones to prohibit the placement of a PIP within 200 yards of another payphone.⁷⁰⁰ Puerto Rico Telephone argues that the Commission correctly deferred such determinations to the states, which are in the best position to evaluate local needs.⁷⁰¹ The RBOC Coalition also urges the Commission to deny APCC's request, arguing that such a rule would unduly hamper the flexibility of states in providing for the public health, safety and welfare.⁷⁰²

252. The RBOCs oppose the assertion of the Ohio PUC that states should be able to place PIPs in areas where payphones already exist but where other market dysfunctions are present. The RBOCs state that Section 276 specifically permits PIPs only "in location[s] where there would otherwise not be a payphone."⁷⁰³

4. Discussion

253. We deny APCC's request that the definition of public interest payphones be modified to exclude payphones located within 200 yards of another payphone.⁷⁰⁴ Besides lacking any basis in the record for specifying a particular distance restriction, we believe that such a requirement would unnecessarily restrict the states' ability to address local geographic, social and economic conditions impacting the need for payphones. It may be that there are locations where these factors make a payphone located 200 yards away effectively inaccessible to some

⁶⁹⁷ Id. at 5-6.

⁶⁹⁸ Id.

⁶⁹⁹ Id. at 7.

⁷⁰⁰ Puerto Rico Telephone Comments at 2-5.

⁷⁰¹ Id.

⁷⁰² RBOC Comments at 24.

⁷⁰³ Id.

⁷⁰⁴ APCC Petition at 6.

consumers. As we stated in the Report and Order, we find that the states are better positioned to respond to the diverse and unique payphones need of their communities.⁷⁰⁵

254. At the same time, however, we recognize that the policy underlying APCC's request is a valid one. The 1996 Act states that public interest payphones are limited to "locations where there would otherwise not be a payphone . . ."⁷⁰⁶ And the Conference Report further clarifies that "the term does not apply to a payphone located near other payphones . . ."⁷⁰⁷ We think that this language makes it clear that Congress intended that public interest payphones not be placed in locations where they would compete with unsubsidized payphones, and the definition we adopted is intended to effectuate this congressional intent.

255. For these reasons, we also deny Ohio PUC's request that we reconsider our determination that PIPs may not be placed in locations where payphones already exist as a result of the market.⁷⁰⁸ As explained above, and contrary to Ohio PUC's argument, Congress did restrict the locations for which states could use the public interest payphone support mechanisms to subsidize the placement of a payphone. As we stated in the Report and Order, the statutory language reflects a congressional intent that reliance on the public interest payphone provision is to be limited to instances where a payphone serves a strong public interest that would not be fulfilled by the normal operation of the marketplace.⁷⁰⁹

256. Ohio PUC does not elaborate on the circumstances under which it would want and be able to place a payphone in a location where the incumbent PSP is realizing extraordinarily high profits from end users who had no other viable alternatives for payphone services. We believe, however, that if it were possible to place a second payphone near to an extraordinarily profitable one, PSPs would be competing to place payphones at this location that would undercut the price of the incumbent. In any event, in its capacity as a location provider, a state may certainly contract with a PSP to place a non-PIP payphone at any location over which it has such authority. As discussed in connection with entry and exit barriers,⁷¹⁰ a state may contract with a PSP to place a payphone on a street corner, or in a school building, or at an airport, that competes with other payphones at or near such locations. It simply may not subsidize such payphones through a public interest payphone support mechanism. Moreover, the state may contract with the PSP on any basis which a PSP is voluntarily willing to offer its

⁷⁰⁵ Report and Order at para.278.

⁷⁰⁶ 47 U.S.C. § 276(b)(2).

⁷⁰⁷ S. Conf. Rep. 104-230 at 43.

⁷⁰⁸ Ohio PUC Petition at 5.

⁷⁰⁹ Report and Order at para. 282.

⁷¹⁰ See para. 141, above.

services. Thus, if the state prefers to require low end-user rates for such payphones, perhaps as a trade-off to receiving lower commissions from the PSP, it may contract with the PSP on those terms.

IV. PROCEDURAL MATTERS

A. Final Paperwork Reduction Act Analysis

257. The conclusions herein have been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and contains collections of information subject to Office of Management and Budget review. The information collection requirements in this item are contingent upon approval by the Office of Management and Budget.

B. Final Regulatory Flexibility Analysis on Reconsideration

258. The following Final Regulatory Flexibility Analysis on Reconsideration (FRFA on Reconsideration) addresses only those issues that we have modified in this Order on Reconsideration in the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (1996 Act). Specifically, this FRFA on Reconsideration addresses modification of tariffing requirements for payphone services, calculating carrier common line (CCL) charges, and amendments to Part 69 of the Commission's rules.⁷¹¹ We also incorporate by reference the original Report and Order (the Report and Order) released on September 20, 1996 (CC Docket No. 96-128), and the Final Regulatory Flexibility Analysis (FRFA).⁷¹²

1. Need for and Objectives of the Order on Reconsideration and the Rules Adopted Herein.

259. This Order on Reconsideration requires no changes to the FRFA in the original Report and Order.⁷¹³

260. The objective of the rules adopted in this Order on Reconsideration is "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public."⁷¹⁴ In doing so, the Commission is

⁷¹¹ 47 C.F.R. § 69 --- Access Charges.

⁷¹² Report and Order at paras. 311-362.

⁷¹³ Id. at paras. 312-313.

⁷¹⁴ 47 U.S.C. § 276(b)(1).

mindful of the balance that Congress struck between this goal of bringing the benefits of competition to consumers and its concern for the impact of the 1996 Act on small businesses.

2. Summary of Petitions for Reconsideration and/or Comments Relating to Small Entities.

261. No party sought reconsideration of our FRFA in this proceeding. The National Telephone Cooperative Association (NTCA), however, requests a clarification of the requirement that LECs file coin transmission services in their access service tariffs may be satisfied by small LECs through participation in a national tariff filed by National Exchange Carrier Association (NECA) and recover its costs through a NECA administered pool. If not, NTCA asks for reconsideration of the decision to require federal tariffing. Moreover, NTCA also requests the Commission to clarify that the tariff provisions to be filed be limited to services added to enable payphone services, such as counting and control of coins and fraud protection, but do not include loops and switching functions, and to clarify the costing methodology to be used.⁷¹⁵

3. Description and Estimate of the Number of Small Entities Affected by this Order on Reconsideration.

262. The modifications in this Order on Reconsideration apply only to incumbent LECs. The estimates of the number of small entities affected by this Order on Reconsideration remain the same as the estimates detailed in the FRFA in the original Report and Order.⁷¹⁶

4. Tariffing Requirements for Unbundling of Payphone Services.

i. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements on Reconsideration.

263. The Order on Reconsideration modifies the federal tariffing provisions to require that LECs must file tariffs with the states regarding the provision of nondiscriminatory basic payphone services that enable LECs and independent providers to provide payphone service using either "dumb" or "smart" payphones. Any basic network services or unbundled features used by a LECs operations to provide payphone services must be similarly available to independent payphone providers on a nondiscriminatory, tariffed basis and must be tariffed in the state and federal jurisdiction. The tariffs for basic payphone services and any unbundled features that LECs provide to their own payphone services must be: 1) cost based; 2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange

⁷¹⁵ NTCA Petition at 2-4.

⁷¹⁶ Report and Order at paras 315-333.

and exchange access services; and 3) nondiscriminatory. States unable to review these tariffs for compliance with Section 276 and other requirements set forth in the Order may require the LECs operating in their state to file these tariffs with the Commission.⁷¹⁷ Compliance with these requirements may necessitate the use of engineering, technical, operational, accounting, billing, and legal skills.

ii. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent and Independent LECs, and Alternatives Considered.

264. This tariff filing requirement is not unduly burdensome on small entities in that LECs are now required to file their payphone service tariffs with the states in the same manner as they have been filing tariffs for other telephone services with the states. Additionally, to provide maximum flexibility and the least burdensome approach, the Order on Reconsideration delegates to the Common Carrier Bureau the authority to determine the least burdensome method for small carriers to comply with the requirements for filing of tariffs with the Commission, such as those suggested by the NTCA.⁷¹⁸

5. Amendments to Part 69

i. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements on Reconsideration.

265. The Order on Reconsideration clarifies and modifies the method for calculating the carrier common line charge to remove payphone costs and to adjust for additional subscriber line revenues. This Order clarifies and revises the exogenous cost adjustment mechanism adopted in the Report and Order and requires LECs to subtract the payphone costs described in Section 69.501(d) of the Commission Rules associated with payphone lines, prior to developing the payphone cost allocator. LECs proposing to subtract payphone line costs or inmate payphone costs for the purpose of their PCI adjustment are required to provide complete details to demonstrate that their line cost calculations are reasonable. LECs can achieve application of multiline subscriber line charges (SLCs) to payphone lines through recalculating and revising carrier CCL charges pursuant to the CCL formula in Section 61.46(d).⁷¹⁹ Compliance with these requirements may necessitate the use of engineering, technical, operational, accounting, billing, and legal skills.

⁷¹⁷ See paras. 162-165, above.

⁷¹⁸ See para. 163, above; NTCA Petition at 2-4.

⁷¹⁹ See para. 205, above.

ii. **Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent and Independent LECs, and Alternatives Considered.**

266. The requirement that LECs proposing to subtract payphone line costs or inmate payphone costs for the purpose of their PCI adjustment must provide complete details to demonstrate that their line cost calculations are reasonable, averts discrimination, facilitates the growth of competition, and ensures that there is no unnecessary burden for all parties, including small entities and small incumbent LECs.⁷²⁰

6. **Report to Congress.**

267. The Commission shall send a copy of this FRFA on Reconsideration, along with the Order on Reconsideration, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA on Reconsideration will also be published in the Federal Register.

V. **CONCLUSION**

268. In this Order on Reconsideration, we affirm the essential features of the policies established in the Report and Order. On reconsideration, however, we modify: (1) the requirements for LEC tariffing of payphone services and unbundled network functionalities; and (2) the requirements for LECs to remove unregulated payphone costs from the carrier common line charge and to reflect the application of multiline subscriber line charges to payphone lines. We also clarify various issues addressed in the Report and Order.

VI. **ORDERING CLAUSES**

269. Accordingly, pursuant to the authority contained in Sections 1, 4, 201-205, 226, 276 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201, 205, 226, 276, and 405, IT IS ORDERED that the policies, rules, and requirements set forth herein are ADOPTED.

270. IT IS FURTHER ORDERED, that 47 C.F.R. Part 69 IS AMENDED as set forth in Appendix C, effective (30) days after publication of the text thereof in the Federal Register.

⁷²⁰ See paras. 203-205, above.

271. IT IS FURTHER ORDERED, that the Petitions for Reconsideration filed by Ohio PUC, NTCA, BellSouth and Sprint, ARE GRANTED in part and DENIED in part, as described herein. All other Petitions for Reconsideration filed in this proceeding ARE DENIED

272. IT IS FURTHER ORDERED, that the Petitions for Clarification filed in this proceeding ARE DENIED in part, and GRANTED in part, as described herein.

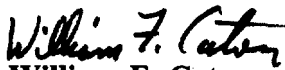
273. IT IS FURTHER ORDERED, that MCI's Motion to Serve One Day Late IS GRANTED.

274. IT IS FURTHER ORDERED, that CompTel's Motion to Accept Petition for Reconsideration, or in the Alternative to Treat As Comments on Petitions for Reconsideration, IS DENIED in part and GRANTED in part, as described herein.

275. IT IS FURTHER ORDERED, that Cable & Wireless' Motion for Temporary Waiver or, in the Alternative, for a Limited Stay, is DENIED.

276. IT IS FURTHER ORDERED, that this Memorandum Opinion and Order on Reconsideration will be effective (30) days after publication of a summary thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

PARTIES FILING PETITIONS

- 1 AirTouch Paging ("AirTouch")
- 2 American Public Communications Council ("APCC")
- 3 Ameritech
- 4 AT&T Corp. ("AT&T")
- 5 BellSouth Corp. ("BellSouth")
- 6 Cable and Wireless, Inc. ("Cable & Wireless")
- 7 People of the State of California and the Public Utilities Commission of California
(California PUC")
- 8 Consumers Union Southwest Regional Office, Center for Economic Justice, Public Citizen
Texas, Texas Citizen Action ("Consumers Union")
- 9 Office of the People's Counsel for the District of Columbia ("OPC-DC")
- 10 Inmate Calling Services Providers Coalition ("Inmate Coalition")
- 11 InVision Telecom, Inc. ("InVision")
- 12 WorldCom, Inc. d/b/a LDDS WorldCom ("WorldCom")
- 13 Maine Public Utilities Commission, Alabama Public Service Commission, District of
Columbia Public Service Commission, Maryland Public Service Commission, Montana
Public Service Commission, Vermont Public Service Commission, Virginia State
Corporation Commission ("Maine PUC")
- 14 MCI Telecommunications Corp. ("MCI")
- 15 National Telephone Cooperative Association ("NTCA")
- 16 New Jersey Payphone Association ("NJPA")
- 17 State of New York Department of Public Service ("New York DPS")
- 18 Public Utilities Commission of Ohio ("Ohio PUC")
- 19 Oklahoma Corporation Commission ("Oklahoma CC")
- 20 PageMart II, Inc. ("PageMart")
- 21 Paging Network, Inc. ("PageNet")
- 22 Personal Communications Industry Association ("PCIA")
- 23 RBOC Payphone Coalition ("RBOC")
- 24 Sprint Corporation ("Sprint")
- 25 Southwestern Bell Telephone Company ("SW Bell")
- 26 Public Utilities Commission of Texas ("Texas PUC")
- 27 United States Telephone Association ("USTA")
- 28 Wisconsin Pay Telephone Association, Inc. ("WPTA")

APPENDIX B

PARTIES FILING COMMENTS⁷²¹

- 1 AirTouch Paging ("AirTouch")
- 2 American Public Communications Council ("APCC")
- 3 Ameritech
- 4 Arch Communications ("Arch")
- 5 AT&T Corp. ("AT&T")
- 6 BellSouth Corp ("BellSouth")
- 7 Competitive Telecommunications Association ("CompTel")
- 8 Inmate Calling Services Providers Coalition ("Inmate Coalition")
- 9 LCI International Telecommunications, Inc. ("LCI")
- 10 Worldcom d/b/a LDDS WorldCom ("WorldCom")
- 11 MCI Telecommunications Corp. ("MCI")
- 12 New Jersey Payphone Association ("NJPA")
- 13 Personal Communications Industry Association ("PCIA")
- 14 Peoples Telephone Company, Inc. ("Peoples")
- 15 Puerto Rico Telephone Company ("Puerto Rico Telephone")
- 16 RBOC Payphone Coalition ("RBOC Coalition")
- 17 Southern New England Telephone ("SNET")
- 18 Sprint Corporation ("Sprint")
- 19 Telecommunications Resellers Association ("TRA")
- 20 Touch 1 Communications ("Touch 1")

⁷²¹ The following parties submitted letters to the Commission, which are treated as informal comments and considered part of the record in this proceeding: Access Health, Inc.; Budget Rent a Car Corp.; Comverse Technology, Inc.; Craddock-Terry, Inc.; Crestar Bank; Delta Air Lines, Inc.; The Hertz Corp.; Japan Airlines; Lincoln National Corp.; Magnetek, Inc.; Marley Mouldings Inc.; Promus Hotel Corp.; Reynolds Metals Co.; SDN Users Association, Inc.; United Airlines; 1-800-FLOWERS.

APPENDIX C**RULES AMENDED**

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 69 -- ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

Authority: Sec. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1077, 1094, as amended; 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.5 is amended by revising paragraph (a) to read as follows:

§ 69.5 Persons to be assessed.

(a) End user charges shall be computed and assessed upon end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part.

* * * * *

3. Section 69.104 is amended by revising paragraph (a), redesignating paragraph (d) as paragraph (d)(1), and adding a new paragraph (d)(2) to read as follows:

§ 69.104 End user common line.

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service or Centrex service to the extent they do not pay carrier common line charges. A charge that is expressed in dollars and cents per line per month shall also be assessed upon providers of public telephones. Such charge shall be assessed for each line between the premises of an end user, or public telephone location, and a Class 5 office that is or may be used for local exchange service transmissions.

* * * * *

(d) (1) * * *

(2) The charge for each subscriber line associated with a public telephone shall be equal to the monthly charge computed in accordance with § 69.104(d)(1).

* * * * *

4. Section 69.501 is amended by removing and reserving paragraph (d); and by revising paragraph (e) to read as follows:

§ 69.501 General.

* * * * *

(e) Any portion of the Common Line element revenue requirement that is not assigned to Carrier Common Line elements pursuant to paragraphs (a), (b), and (c) of this section shall be apportioned between End User Common Line and Carrier Common Line pursuant to § 69.502. Such portion of the Common Line element annual revenue requirement shall be described as the base factor portion for purposes of this Subpart.